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No. 80-203

IN THE

Supreme Court of the United States

October Term, 1981

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

J.J. CURRAN and JACQUELYN L. CURRAN
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION BY SAMUEL FRIEDMAN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Samuel Friedman hereby respectfully moves pursuant to Supreme Court Rule 36.3 for leave to file a brief *amicus curiae* in support of respondents. Consent of petitioner and of respondents to file this brief was requested but refused by petitioner.

Samuel Friedman is plaintiff in *Samuel Friedman* v. *Bache Halsey Stuart Shields, Inc., Bache Group, Inc., Board of Trade of the City of Chicago, Nelson Bunker*

Hunt, William Herbert Hunt and Lamar Hunt, No. 80 C 1111, presently pending in the United States District Court for the Northern District of Illinois. Friedman's suit alleges that his commodity futures broker and its affiliates (the "Bache defendants"), acting in concert with the Hunt defendants and with the acquiescence of the Chicago Board of Trade, participated in a mammoth manipulation of the market price of silver futures contracts, thus violating Section 9(b) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 13(b). Against the background of this mammoth conspiracy, moreover, the Bache defendants allegedly induced Friedman to make substantial investments, resulting in losses of approximately $600,000, in short sales of silver futures. The inducements made by Bache included false and fraudulent representations and failure to disclose material facts concerning the illegal conspiracy between Bache and the Hunts to manipulate silver futures prices. Among these many undisclosed facts was a substantial, unreported equity position* of the Hunts in Bache. All of these fraudulent inducements make out claims against Bache for violations of Section 4b of the CEA, 7 U.S.C. § 6b.**

Only days after Friedman brought this action in the Northern District of Illinois, Bache brought a contractual action against him in state court in Florida. *Bache* v. *Friedman*, 80-4340, Circuit Court for the Eleventh Judicial District. Thus, Friedman is both a defendant sued in con-

* Itself in excess of 5% and thus in violation of the Securities Exchange Act registration requirements.

** Friedman's antitrust claims against all defendants have been dismissed, albeit Judge McMillen is currently entertaining a motion to reconsider or grant leave to appeal from such dismissal.

tract and a plaintiff suing under the CEA. He alleges wrongs at the hands of both registrants and non-registrants, acting in concert and individually, and requires proper discovery against both in order to establish his antifraud claim.

Friedman here supports respondents' position that 7 U.S.C. § 6b provides an implied private right of action against commodity futures brokers by their defrauded customers. But Friedman's situation is much more enlightening than respondents' because, if respondents should fail to uphold the private right of action under 7 U.S.C. § 6b here, Friedman and those investors similarly situated would find themselves in a uniquely inequitable position in two respects.

First, brokers guilty of fraud would be able to sue their customers in contract for any account deficit, in state or federal court (in diversity), while forcing the beleagured investor to take his CEA counterclaims into a reparations proceeding under 7 U.S.C. § 18, the courts having been ousted of jurisdiction over the CEA claims. See, *e.g.*, *Paine Webber Jackson & Curtis, Inc.* v. *Rosciszewski*, [Current] Comm. Fut. L. Rptr. [CCH] ¶ 21,175 (S.D. Cal., April 16, 1981), allowing such a broker to proceed with its suit on an account, notwithstanding the customer's posited inability to bring CEA counterclaims. Meanwhile, the investor would himself be able to obtain no relief in reparations until he got to the head of an already extremely long line of backlogged reparations claimants. See CFTC Annual Report for 1979, p. 29.

Second, Friedman and those similarly situated could not get all necessary defendants before the same forum and

could not obtain proper discovery, because reparations is available only against registrants, and Friedman's antitrust claim and his other claims involve both registrants (brokerages) and non-registrants (exchanges and the Hunt defendants). Indeed, should this Court hold that no provision of the CEA offers an implied private right of action, Friedman might never obtain any relief at all against the non-registrants. The Hunt silver debacle might then become the forerunner of similar, wide-ranging commodity manipulations which would flourish in an environment where victimized investors had no effective, comprehensive legal remedy.

Finally, in Friedman's situation the position taken by petitioner paints Congress as having irrationally intended not only these two inequitable results, but also the additional absurdity of something precisely contrary to Congress' purpose. While none dispute that Congress intended by the 1974 Amendments to the CEA to *strengthen* deterrence against the many evils in the "badlands of the commodities markets," *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 435 (N.D. Cal. 1968), peitioner's position paints Congress as having intended to (i) strip investors of their right to sue, (ii) make reparations proceedings under 7 U.S.C. § 18 the exclusive remedy, and (iii) subject investors like Friedman to suit by their brokers without any right to make CEA counterclaims. Heightening the absurdity of petitioner's view is that, Congress having supposedly intended to eliminate one deterrent (private suit), it then intended to "strengthen" deterrence by allocating to the CFTC woefully insufficient resources to handle even the limited number of reparations proceedings currently being brought by defrauded investors. See CFTC Annaul Report for 1979, p. 29.

Accordingly, Friedman has special incentives to uphold the implied private right of action under 7 U.S.C. § 6b, and to preserve the federal courts as a forum for comprehensive relief of CEA claims. Should petitioner prevail here, investors like Friedman would be prejudiced by inappropriate discovery and extremely slow, substantively inadequate relief against registrant wrongdoers, and, should the Court hold against respondent in *New York Mercantile Exchange* v. *Leist* (80-757) as well, no relief at all under the CEA against non-registrants.

Friedman therefore requests the Court's leave to file the attached brief *amicus curiae*, in support of respondents.

Dated: August 29, 1981

Respectfully submitted,

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BRIEF FOR SAMUEL FRIEDMAN AS *AMICUS CURIAE*

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Question Presented

Whether the comprehensive amendment in 1974 of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, (the "CEA") extinguished the implied private civil action that had previously been recognized to exist in favor of customers against their brokers who commit fraud in violation of Section 4b of the CEA, 7 U.S.C. § 6b?

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Interest of the *Amicus Curiae*

Amicus Samuel Friedman is plaintiff in *Samuel Friedman* v. *Bache Halsey Stuart Shields, Inc., Bache Group, Inc., Board of Trade of the City of Chicago, Nelson Bunker Hunt, William Herbert Hunt and Lamar Hunt*, No. 80 C 1111, presently pending in the United States District Court for the Northern District of Illinois. Friedman's suit alleges that his commodity futures broker and its affiliates (the "Bache defendants"), acting in concert with the Hunt defendants and with the knowing or negligent acquiescence of the Chicago Board of Trade, participated in a mammoth manipulation of the market price of silver futures contracts, thus violating Section 9(b) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 13(b).* Against the baeground of this mammoth conspiracy, moreover, the Bache defendants allegedly induced Friedman to

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* It is a matter of record that the Hunts (long-experienced in manipulation of the various commodities, see *Commodity Futures Trading Commission* v. *Hunt*, 591 F.2d 1211 (7th Cir. 1979); "Hunts Paying Civil Penalties on Soybeans," in *The New York Times*, July 22, 1981, p. D-14) formed an off-shore joint partnership venture with several Arabs to accumulate all-time record long futures positions in silver futures contracts, financed through and otherwise assisted by Bache, while the Hunts were simultaneously saving Bache's management from a threatened takeover by Canadians. See, "Bache-Hunt Tie Raises Questions/Effect on other Clients is Cited," *The New York Times*, April 2, 1980, pp. D-1, D-11; "10 Banks Lent Bache $233 Million/Funds Reported To Be For Hunts," *The New York Times*, May 2, 1980, pp. D-1, D-4; Canadian Concern Looks With Interest at Bache," *The New York Times*, January 14, 1980, pp. D-1, D-2; "Bunker Hunt Lists New Data On Purchase Of Bache Stock That May Be Damaging," *Wall Street Journal*, August 13, 1980, p. 7.

We believe the egregious unlawfulness here exemplifies the "badlands of the commodities markets." *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 435 (N.D. Cal. 1968). "From the beginning, the inherent speculativeness of commodity trading and the absence of government regulation spawned a breeding ground for unscrupulous

(footnote continued on next page)

make substantial investments, resulting in losses of approximately $600,000, in short sales of silver futures. The inducements made by Bache included false and fraudulent representations and failure to disclose material facts concerning the illegal conspiracy between Bache and the Hunts to manipulate silver futures prices.

Friedman is concerned that if this Court were to rule that there is no implied private right of action under 7 U.S.C. § 6b, Friedman would be compelled to resist contract claims by his broker in Florida state court, now pending in *Bache* v. *Friedman*, 80-4340, Circuit Court for the Eleventh Judicial District of Florida, without the opportunity to present counterclaims under 7 U.S.C. § 6b relating to the same transactions, in Florida or in any other court.*

Furthermore, should 7 U.S.C. § 6b not provide a private right of action and Friedman be forced to resort to reparations, then the Hunts and other non-registrants, who are statutorily not amenable to reparations proceedings, could not be brought before the same forum as the registrant defendants, nor could proper discovery regarding the CEA antifraud claim be had.

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tactics, manipulation, and irresponsible trading." *Precious Metals Associates* v. *CFTC*, 620 F.2d 900, 905 (1st Cir. 1980).

Indeed, we believe that the prevalence of these evils and the ease of with which futures markets were perverted were precisely the factors which prompted Congress to amend comprehensively the CEA in 1974 in order to "strengthen deterrence." See generally the discussion of legislative history in *Leist* v. *Simplot*, 638 F.2d 283, 296, 305-07, 322-23 (2d Cir. 1980). These points (which, we believe, underpin the strongest arguments supporting implication of private actions under the CEA here) have already been made in the Brief for Respondents in *New York Mercantile Exchange* v. *Leist*, No. 80-757, *passim*, and will not be repeated herein.

* See *Paine Webber Jackson & Curtis, Inc.* v. *Rosciszewski*, [Current] Comm. Fut. L. Rptr. [CCH] ¶ 21,175 (S.D. Cal., April 16, 1981).

Finally, should this Court hold that *no* provision of the CEA provides a private right of action, Friedman might have no single forum before which to bring all necessary defendants in his attempt to gain redress for his losses in the massive Hunt silver market manipulation.

Summary of Argument

Congress never intended the creation of the CFTC in 1974 to extinguish other then-existing modes of regulating commodity futures transactions. Primary among those other methods of controlling commodity futures abuses was the then universally recognized implied private right of action under the CEA. Congress reaffirmed these other modes again in 1978 when it reacted to state hesitancy to help enforce the CEA as *parens patria* by authorizing the states to sue for money damages as the collective representative of individual private claimants. Express language in the reparations (7 U.S.C. § 18) and arbitration (7 U.S.C. § 7a(11)) provisions of the CEA specifies that they are optional, and hence alternative procedures to the implied private right of action under the CEA. Congress could not have intended the reparations procedure to oust courts of comprehensive jurisdiction over CEA claims, since such a regime would enable brokers to sue defrauded investors in contract but bar investors from making CEA counterclaims. Furthermore, victims of broad commodity manipulations would find themselves unable to bring all wrongdoers before any single forum, should the Court hold that Congress intended to vest in the CFTC exclusive jurisdiction, in reparations proceedings, over those among the wrongdoers who happen to be registrants under the CEA.

ARGUMENT

In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), this Court spelled out four criteria by which courts could assess whether an implied cause of action should be read into any given federal statute.

In *Davis* v. *Passman*, 442 U.S. 228 (1979), this Court stated explicitly that the *Cort* approach merely provides criteria through which Congressional intent can be discerned. In recent cases, this Court has exhibited an increasing emphasis on the elements of the *Cort* analysis which focus on the relevant statutory scheme, the statutory structure, and statutory language. *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979).

Whatever analysis is employed, be it *Transamerica* (see Part I herein) or *Cort* (see Part II herein)—it is clear that Congress intended to continue the private right of action under 7 U.S.C. § 6b.

I.

The Regulatory Scheme, the Structure, and the Express Provisions of the CEA All Assume and Hence Indicate the Existence of an Implied Private Right of Action.

A. The Explicit Regulatory Scheme of the CEA Leaves Ample Room For, and at Points Relies on, an Implicit Private Right of Action.

Petitioner seeks, by minutely describing the "framework of the uniform, cohesive and expert CFTC administration of commodity futures trading that is the cornerstone of the 1974 Amendments," Brief of Petitioner at 12,

to portray the express scheme of CFTC regulation under the CEA as occupying the whole field of commodity futures trading. Congress, the CFTC, and the courts do not agree with petitioner.

Congress does not agree with petitioner. Far from viewing commodity futures trading as the exclusive preserve of the CFTC, the Congress in 1978 blithely empowered state attorneys general to sue for injunctive relief and *monetary damages* on behalf of residents of their respective states, Section 6d of the CEA, 7 U.S.C. § 13a-2, while the legislative history reflects no indication that Congress viewed such damage suits as a seachange in the 1974 scheme or an unprecedented incursion into the CFTC bailiwick. To the contrary, the legislative history of this 1978 *parens patriae* provision shows Congress understood that it was codifying existing principles. Able counsel for petitioner, ignoring the obvious anomaly in his argument that Congress authorized the states to sue collectively based on rights that purportedly do not exist individually, seeks to turn the evidence on its head by arguing that the codification of *parens patriae* suggests the disavowal of the implied private right of action, because that implied right has *ipso facto* not been likewise codified. Yet the extensive discussion of the 1978 Amendments *infra* pages 19 to 21 demonstrates beyond peradventure that Congress enacted *parens patriae* because the *implied parens patriae* doctrine had developed technical and procedural problems which had discouraged its utilization by the states.

The CFTC also does not agree with petitioner, since it consistently takes the position that private damage actions will supplement, rather than confuse, the regulatory

scheme. See, *e.g.*, Brief for the CFTC as Amicus Curiae, *New York Mercantile Exchange* v. *Leist* and related cases Nos. 80-757, 80-895 and 80-936, Supreme Ct. of U.S.

Nor do the federal courts agree that CFTC regulation occupies the whole field of commodity futures trading. Prior to the 1974 Amendments to the CEA, it was "undisputed that a private cause of action may be maintained under the Commodity Exchange Act." *Case & Co.* v. *Board of Trade*, 523 F.2d 355, 360 (7th Cir. 1975). Although the uniformity of these court decisions under the CEA has weakened since 1974, a strong preponderance of recent cases still upholds the private right of action under the CEA.

As the CFTC has itself recognized, the coherence of any regulatory scheme depends upon neither (1) the identity of the party plaintiff nor (2) the forum in which adjudication takes place, but rather upon the body of law being applied. See CFTC Memorandum to all state securities administrators (October 8, 1976), reprinted at [CCH] Comm. Fut. L. Rptr. ¶ 20,218 [1975-77 Transfer Binder], (hereinafter "CFTC Memorandum") supporting state *parens patria* actions under the CEA (*prior* to their express statutory authorization in 1978, CEA § 6d, 7 U.S.C. § 13-a2) on the basis that "since the new *federal* law, there will be no question of [federal] preemption of state action [in bringing injunctive suits] . . ." at p. 21,187 (emphasis in original).

It is a mistake to assume, as petitioner does here, that the strengthening of administrative powers and the creation of administrative remedies carved out at an air-tight regulatory compartment for the CFTC. Just as Congress in

1978 expressly authorized the states to sue under the CEA as *parens patria* (7 U.S.C. § 13a-2), and implicitly authorized (in our view and the view of many courts) injured private citizens to seek relief in court under the CEA, so has there been room for law enforcement officials to prosecute mail fraud in commodity futures transactions (*United States* v. *Shareef*, 634 F.2d 679 (2d Cir. 1980); *United States* v. *Brien*, 617 F.2d 299, 309-11 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980) (both applying 18 U.S.C. § 1341 to commodities futures transactions)), and for private persons to sue for damages under the antitrust laws (*Pollock* v. *Citrus Associates*, 512 F. Supp. 711 (S.D.N.Y. 1981)).

B. The Structure of the CEA Requires, and Hence Shows Congressional Intent to Create and Preserve, an Implied Private Right of Action.

Apart from the fact that the entire spirit and framework of the CEA exhibits no effort on the part of Congress to supplant private (or state or non-CFTC agency) enforcement of the CEA with a solely CFTC-administered regime, the specific structural components of the CEA require a conclusion that Congress built the CEA with an implied private right of action in mind.

The reparations provisions of Section 14 of the CEA, 7 U.S.C. § 18, would degenerate into a nightmare of procedural fragmentation, should this Court rule that the CEA permits no private right of action. Congress could not have intended such a result, but instead must have intended

to create an *expedited, limited* reparations procedure* to be invoked against *specified* classes of *commodities professionals* at the *option* of the investor.

As petitioner would have it, an investor standing in the shoes of the *amicus*, who presses claims against registrants (brokerage houses under 7 U.S.C. § 6b for fraud and 7 U.S.C. § 13(b) for manipulation, and other state and federal laws), non-registrant commodity exchanges (for failure to regulate, under 7 U.S.C. § 7a(8)), and other non-registrants (for CEA manipulation and other federal violations) in connection with the Hunt's mammoth silver debacle, would be forced into a wonderland of civil procedure. *Amicus* Friedman would have to sue the non-registrants in federal court, where he might not be able to obtain complete relief for want of necessary (registrant) defendants. Meanwhile Friedman would have to sue the registrant brokerages for reparations before the CFTC and be similarly unable to make out his claims there in the absence of the non-registrant defendants. Meanwhile, the futures commission merchant is suing him in state court, and, most ironic of all, *amicus* would lack the ability to assert CEA violations as *counterclaims* in that state action if those claims be required to be brought in reparations. All of this irrationality results only if this Court holds, as petitioner asks, that Congress *sub silentio* divested the federal courts of the power to entertain, in a global way, claims based on federal commodity laws.

* Now, however, already seriously backlogged because of inadequate staffing of the CFTC reparations section. CFTC Annual Report for 1979, at 29.

C. Express Provisions of the CEA Show Congressional Intent to Create and Preserve an Implied Private Right of Action.

Petitioner here, in insisting that Congress extinguished the private right of action in 1974 by not expressly stating otherwise, poses as champion of the explicit wording of the CEA. Yet by insisting that no *implied* right of action exists under 7 U.S.C. § 6b of the CEA for fraud by registered persons, petitioner repudiates the *express* language of 7 U.S.C. § 18, the reparations provision enacted in 1974 as Section 14 of the CEA.

Subsection (a) of 7 U.S.C. § 18 reads in full as follows:

> (a) Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title *may*, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission. [Emphasis supplied.]

Note that the provision (1) *expressly* places in the hands of the investor the *option* of initiating reparations proceedings against a registered futures commission merchant, floor broker, commodity trading advisor or commodity pool operator, (2) *nowhere* expressly purports to divest federal courts of their pre-1974 jurisdiction over such claims

against registered persons, and (3) gives no reciprocal rights to registered persons to bring administrative actions against investors (*i.e.*, the public was to receive an additional shot at cheaters, see fn. p. 1 *supra*, but cheaters were not granted an additional shot at the public). This express language gives absolutely no support to petitioner's view that reparations under 7 U.S.C. § 18 were meant to oust the federal courts of their comprehensive jurisdiction over private claims (and related brokerage counterclaims) under the CEA.

Indeed, this express language of 7 U.S.C. § 18, in giving the investor the option to initiate reparations, in nowhere divesting courts of their pre-1974 jurisdiction over registered persons, and in giving no reciprocal rights to registered persons to initiate reparations, is unequivocal in its objective to protect the investing public against registered persons, and *not* to create any special benefits for registered persons as against the investing public. The objective of the 1974 CEA Amendments was to *strengthen* regulation of what had been referred to as the "badlands of the commodities markets," *Hecht* v. *Harris, Upham & Co., supra*, 283 F. Supp. at 435. It had been primarily futures commission merchants, floor brokers, commodity trading advisors and commodity pool operators who had engaged in the "unscrupulous tactics, manipulation, and irresponsible trading," *Precious Metals Associates* v. *CFTC, supra*, 620 F.2d at 905, which Congress attempted to bring under control in 1974. Everything in the legislative history of the 1974 Amendments thus accords with the express language of 7 U.S.C. § 18: reparations was meant to be a *supplemental* remedy for the benefit of investors, not a procedure

supplanting investor rights of action to the benefit of commodity professionals.

In an attempt to avoid this clear import of the express language of 7 U.S.C. § 18, petitioner interprets 7 U.S.C. § 2, the provision granting "exclusive jurisdiction" to the CFTC, as ousting the federal courts of their pre-1974 jurisdiction over private claims against registered persons. Yet this very reading of 7 U.S.C. § 2 by petitioner flies in the face of the express wording of the *next sentence* of 7 U.S.C. § 2 following the "exclusive jurisdiction" proviso: "Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State."

To recapitulate this review of *express* provisions of the CEA, petitioner seeks to avoid the expressly optional character of reparations proceedings by citing to the "exclusive" CFTC jurisdiction language of 7 U.S.C. § 2, which language itself is *expressly* stated by Congress to leave unaffected the pre-1974 jurisdiction of federal and state courts.

If petitioner's view were not an untenable reading of the express language of the CEA, it would still contradict the unequivocal legislative history of 7 U.S.C. § 2. The relevant Senate, House and Conference Committee reports all show that the intent of the "exclusive jurisdiction" language was to preclude other *agencies*, primarily the Securities and Exchange Commission but also other federal and state agencies, from interfering in CFTC administration of the commodity futures regulatory scheme. See, *e.g.*, [1974] U.S. Code Cong. & Admin. News 5843, 5848,

5863-64, 5870 (Reprinting Senate Report 93-1131) and 5894, 5897 (House Conference Report 93-1383). Similarly, the CFTC itself has always viewed 7 U.S.C. § 2 as protecting its jurisdiction from encroachment by other federal and state agencies. See CFTC Memorandum, *supra*, Comm. Fut. L. Rptr. [CCH] ¶ 20,218 [1975-77 Transfer Binder] *passim*, but particularly at p. 21,190.

In short, both the express language of 7 U.S.C. § 18 (creating an *optional* reparations procedure) and of 7 U.S.C. § 2 (preserving court jurisdiction), supported by legislative history, refute petitioner's contention the pre-1974 private court actions against brokers under 7 U.S.C. § 6b have been ousted by the reparations procedure. Fraud by brokers in commodity futures transactions remains actionable in federal court, just as it has been since at least 1967. See *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440, 447 (N.D. Ill. 1967).

Further express indication that Congress preserved the implied private right of action is offered by Section 5a(11) of the CEA, 7 U.S.C. § 7a(11), part of the 1974 Amendments, which requires contract markets to provide arbitration procedures, but specifies that such procedures "shall be voluntary."

II.

Application of the *Cort* v. *Ash* Analysis Similarly Compels the Conclusion that Congress Intended in 1974 and Thereafter to Preserve the Private Right of Action Under Section 4b of the CEA, 7 U.S.C. § 6b.

In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), this Court set forth a four-pronged analysis to guide courts in determining whether an implied cause of action should be read into any given federal statute. The four following subheadings touch upon each of those *Cort* v. *Ash* considerations.

A. Section 4b, 7 U.S.C. § 6b, is by Its Terms Expressly Enacted for the Especial Benefit of Participants In Commodity Futures Markets.

If petitioner purports to worship at the shrine of express statutory language, nothing could be clearer than that 7 U.S.C. § 6b was expressly enacted for the especial benefit of investors such as respondent here and *amicus* Friedman:

> **§ 6b. Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for commodities**
>
> It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made or to be made, on or subject to the rules of any contract market, *for or on behalf of any other person*, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any

commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, *for or on behalf of any other person* if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud *such other person;*

(B) willfully to make or cause to be made *to such other person* any false report or statement thereof, or willfully to enter or cause to be entered *for such person* any false record thereof;

(C) willfully to deceive or attempt to deceive *such other person* by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract *for such person*; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent *of such person* to become the buyer in respect to any selling order *of such person*, or become the seller in respect to any buying order *of such person* . . . [Emphasis supplied.]

By its express terms, therefore, 7 U.S.C. § 6b is directed solely toward the protection of a well-defined class: participants in the commodity futures markets. Such investors, and only such investors, are the "other person(s)" referred to in the statute as the targets of proscribed conduct.

Petitioner hides behind a truism when it argues that "the CEA proscribe(s) activities deemed detrimental to commerce." Brief of Petitioner at 26. *All* regulatory prohibitions are presumed by Congress to serve some higher, generalized social purpose, beyond protecting the narrow class of persons (here, commodity investors) specifically identified in the statute. Congress presumably always has a wider social objective (here, protecting commerce in commodities) when it protects a narrow class of specified persons (here, again, the class of commodity investors). The only question in cases such as this is to identify that narrower class, if such there be, for whose "especial benefit" the statute was enacted. Plain statutory language here gives us a clear answer to that question.

Peitioner creates a smokescreen in invoking *California* v. *Sierra Club*, 101 S. Ct. 1775 (1981), which construed a proscription against obstructing navigable waters. There "(t)he language of the statute (33 U.S.C. § 403) and its legislative history do not suggest that the Act was intended to create federal rights for the especial benefit of a class of persons but rather was intended to benefit the public at large . . ." *Ibid* at 1781. In other words, the statute in *Sierra Club* makes no mention of, say, "riparian landowners," "shipping companies," "shippers," or any other class arguably directly implicated in the larger public interest. Where no potential plaintiffs are described, courts are naturally reluctant to imply a cause of action. Such is not the case where the CEA is involved, and particularly here where the express language of 7 U.S.C. § 6b is in issue.

Nor should any Court be confused by petitioner's attempt, Brief of Petitioner at 26, to fragment the class of

commodity investors into meaningless subclasses: "hedgers, speculators, shippers, dealers, millers, commission merchants, exchanges, floor traders and others" are all under the umbrella of the CEA, according to petitioner. Yet most of the specious groups enumerated by petitioners overlap, more or less completely, or even swallow one another whole, and thus have no real legal significance; others of petitioner's enumerated groups (*e.g.*, exchanges, shippers) do not fall within the protected class and thus do not have an implied right of action under any view of the law. In short, 7 U.S.C. § 6b expresses an "unmistakable focus" on a class of protected potential plaintiffs, however petitioner might seek to blur that focus.

When faced with this same question as to whether 7 U.S.C. § 6b "was enacted for the benefit of an *especial* class of which plaintiff is a member" (emphasis in original) the District Court of New Jersey concluded, as does *amicus* here, that: "The language of the Act itself answers this question [in the affirmative]." *Alken* v. *Lerner*, 485 F. Supp. 871, 875 (D.N.J. 1980).

B. Explicit and Implicit Indications of Legislative Intent Bear Out the Congressional Intent to Preserve the Private Right of Action Under Section 4b, 7 U.S.C. § 6b.

Divining Congressional intent is of course the objective of the entire *Cort* exercise, such that explicit and implicit indications of that legislative intent are the most important of the four areas of the *Cort* analysis. This Court already has before it, in this and related cases, an ample exegesis of the legislative history as set forth in Congressional

reports, hearings and debates, all of which provide powerful evidence that Congress had no intention to extinguish the pre-1974 private right of action under the CEA. See, *e.g., New York Mercantile Exchange* v. *Leist* and related cases Nos. 80-757, 80-895 and 80-836, Brief of CFTC as *Amicus Curiae* at pp. 10-12, 20-22, 23-26, Brief of Respondents Leist *et al.* at pp. 25-34, 36-38.

Amicus here thus will not belabor this most important analysis of legislative history, except to point out that petitioner here approaches this legislative history from precisely the wrong direction.

Petitioner couches its entire analysis of the legislative history in terms of whether Congress in 1974 *created* an implied private right of action under the CEA, rather than whether Congress *preserved* the private right of action previously routinely acknowledged by the courts to exist.

Yet *Cort* does not require that Congressional intent be distorted by such an attempt to ascertain it *in vacuo*. As this Court stated in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979):

> We of course adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1979 must take into account this *contemporary legal context*. In sum it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactments to be interpreted in conformity with them. (Emphasis added.)

441 U.S. at 701. The "contemporary legal context" at bar was uniform judicial acceptance of a private right of action

under the CEA, as of 1974. This case, therefore, should properly be viewed as presenting the question as to whether Congress *sub silentio* overturned a solid body of judicial precedent, rather than whether Congress "implied" a right of action *de novo*.

In conjunction with this fundamental misstatement of the legislative context in which Congress acted in 1974, petitioner further seeks to discredit those of the cases which embraced the private right of action under the CEA which rely, in whole or in part, on a "tort per se" analysis. Yet the *current* validity of *past* legal reasoning is irrelevant to the "contemporary legal context" in which Congress acted in 1974. In 1974 there *was* an implied right of action under the CEA, and Congress proceeded on that basis. Compare, for example, the much more vivid and radical application of these "contemporary legal context" considerations in *Flood* v. *Kuhn*, 407 U.S. 258 (1972), where this Court refused to modify a unique, judicially implied immunity from the antitrust laws enjoyed by professional baseball:

> If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by Congress and not by this Court.

407 U.S. at 284.* Much better grounds for leaving in place what Congress has not expressly disavowed exist here, where the private right of action under the CEA, far from being illogical, meshes perfectly with the regulatory scheme, statutory structure, and express terms of the CEA. Con-

* Illogic and inconsistency here would lie in painting the 1974 Congress as having intended to achieve strengthened deterrence of abuses by eliminating, rather than supplementing, the existing deterrents.

versely, this Court should be slow to impute to Congress an intent to disavow the *status quo* where, as here, manifest injustice would result to investors who would be deprived of their sole comprehensive remedy for CEA abuses.

One final point must be made about the indicia of legislative intent here. Petitioner (Brief of Petitioner at 33) makes much of the 1978 enactment by Congress of an *express* authorization of *parens patria* actions under the CEA (7 U.S.C. § 13a-2). Why, asks petitioner, did Congress *explicitly* authorize the states to sue in 1978, while in 1974 *implicitly* granting a private right of action to individuals?*

The answer to this conundrum lies, as might be expected, in the legislative history of the *1978* Amendments to the CEA. That history clearly shows that Congress had before it earnest entreaties from state securities administrators that the 1974 Amendments to the CEA had fostered "huge nationwide commodity swindles," partly attributable to the squeezing out of state authorities by "the preemptive language found in Section 2(a)(1) of the Commodity Exchange Act" and partly because of the negative "attitude the Commission ha[d] adopted toward antifraud actions by other agencies." Statement of Thomas L. Krebs, Director of Alabama Securities Commission, Hearings Before the Senate Subcommittee on Agricultural Research Concerning Reauthorization of CFTC, Part II, (March, 1978) (hereinafter "Senate Sunset Hearings") p. 658.

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* Petitioner argues, as a make-weight, that 7 U.S.C. § 13a-2 provides "retention of control within the CFTC" of *parens patriae* suits, when in fact the statute provides little more to the CFTC than written notification of and a right to intervene in the state-initiated lawsuit.

Thus, while preemption of state agency action by the 1974 Amendments had opened a huge gap in regulatory control of commodities frauds, the states soon found themselves unable to close that gap by falling back upon state *parens patria* enforcement of *federal* [CEA] law, partly because the *parens patriae* procedure had been called into question by the new, minority line of federal cases questioning the existence of a private right of action. Senate Sunset Hearings at 673, Reprinting the Interim Staff Report to the Commodity Options Task Force of the North American Securities Administrators Association. More importantly, apart from the new questions as to whether the CEA gave a private right of action upon which to base *parens patriae* suits, there were serious procedural questions about the validity of the theory of *parens patriae* as a vehicle for *damage* actions. CFTC Memorandum, *supra*, [CCH] Comm. Fut. L. Rptr. ¶ 20,218 at p. 21,189, n. 22.

There were both technical and procedural problems with *parens patriae* that had to be addressed by Congress in 1978:

> The problems with proceeding under either of the two doctrines that the Commission has outlined are, first of all, as to parens patriae, it is a very tenuous doctrine. Not all the courts have recognized it and have only recognized it in limited circumstances. Suit can only be brought under that theory by the Attorneys General of the States, not by the regulators or by the enforcement agencies which are most familiar with financial crimes.

Testimony of C.G. Goodkind, Deputy Wisconsin Securities Commissioner, *Hearings on H.R. 10285 to Extend Commodity Exchange Act Before the Subcommittee on Conser-*

vation and Credit of the House Comm. on Agriculture, 95th Cong., 2d Sess. (1978) (hereinafter "House Sunset Hearings") p. 173. But the CFTC was anxious to keep *parens patriae* alive, since it would enforce *federal* [CEA] law with state manpower. In the words of CFTC Chairman Bagley, "We want their [the states'] help. We are starving for help." House Sunset Hearings at 90. But *no* change of law was involved: "What we are proposing in our amendment is that the States be entitled to enforce our regulations as we feel they can now. But we would codify it and put it in Federal Court." Testimony of CFTC Vice Chairman J.V. Rainbolt, House Sunset Hearings at 81. In short, the CFTC supported *parens patriae*, as it supports the private right of action, as an aide to enforcement of the CEA. Codification in 1978 was necessary primarily to resolve certain technical and procedural questions.

In short, the express enactment of *parens patria* authority in 1978 must be seen as part of a Congressional effort to staunch the deterioration of state agency enforcement action which had occurred under the regime established by the 1974 Amendments, and to resolve the broader technical and procedural questions as to whether any *parens patriae* action could seek money damages. The 1978 Amendments show that Congress moved to *prevent* the devolution upon the CFTC of sole responsibility for CEA enforcement, not, as petitioner would have it, to buttress the "exclusive jurisdiction" of the CFTC.

C. Implication of a Private Right of Action is Consistent With, Indeed a Keystone of, the Underlying Purposes of the Legislative Scheme.

In the words of Judge Friendly, *Leist* v. *Simplot*, *supra*, 638 F.2d at 296: "The history of congressional concern with commodity futures trading has thus been one of steady expansion in coverage and strengthening of regulation. . . . [This] increasingly strong regulation [was] designed to insure the existence of fair and orderly markets." In two words, the purpose of the 1974 Amendments, and to a lesser extent the purpose of the CEA generally, was to "strengthen deterrence" of abuses in the commodity futures markets. See fn. p. 1, *supra*.

D. Commodities Trading is Quintessentially a Federal Concern, such that the Private Right of Action Poses No Interference with the Concerns of the States.

Petitioner does not dispute that commodity futures regulation is essentially national in character. Brief of Petitioner at 39. Accordingly, state interests are no barrier to the creation or preservation of an implied private right of action under the CEA.

Conclusion

This Court should uphold the court of appeals below, and recognize that Congress intended to preserve a private right of action under 7 U.S.C. § 6b when it created the CFTC in 1974.

Respectfully submitted,

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